Supreme Court of Kentucky

92-SC-118-D
(88-CA-2649)

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, MIKE SHARP
AND DAN BULISHAK *Movants*

V. FAYETTE CIRCUIT COURT
85-CI-642

JOHN W. HUTCHINSON *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 17, 1992.

Robert F. Stephens

Chief Justice

Commonwealth Of Kentucky
Court Of Appeals

88-CA-2649-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 85-CI-0642

JOHN W. HUTCHINSON — *APPELLANT*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and DAN BULISHAK — *APPELLEES*

ORDER DENYING PETITION FOR REHEARING
AND MODIFYING OPINION

BEFORE: DYCHE, HOWERTON, and STUMBO, Judges.

The Court, having considered the Petition for Rehearing or, in the Alternative, for Modification or Extension, and being sufficiently advised, it is ORDERED that the same is hereby DENIED. Further, the Court, on its own, modifies pages 1 and 6 of its opinion rendered November 1, 1991, and substitutes new pages 1 and 6 therefor.

ENTERED: January 24, 1992

JUDGE, COURT OF APPEALS

Commonwealth Of Kentucky
Court Of Appeals

88-CA-002649-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
CASE NO. 85-CI-0642

JOHN W. HUTCHINSON — *APPELLANT*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and DAN BULISHAK — *APPELLEES*

AFFIRMING IN PART AND REVERSING IN PART

BEFORE: DYCHE, HOWERTON, and STUMBO, Judges.

STUMBO, JUDGE. This is an appeal from a jury trial in the Fayette Circuit Court. Appeallant's suit was grounded in both tort and civil rights violations and arose from an altercation

DYCHE, JUDGE, DISSENTING IN PART. I must respectfully dissent from so much of the majority opinion as remands for a new trial on the § 1983 action. That claim of appeallant is barred on "the use of excessive and completely unwarranted force" by Bulishak and Sharp; the tendered instruction also required this finding to support an award under § 1983. The unanimous jury found against appellant on this issue, so it was no error, or at worst harmless error to refuse to add instructions more fully setting out the alleged cause of action.

ATTORNEYS FOR APPELLANT:

Daniel T. Taylor III
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ATTORNEY FOR APPELLEES/
SHARP and BULISHAK:

Ernest H. Jones II
Lexington, KY

ATTORNEY FOR APPELLEE/
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT:

Edward W. Gardner
Lexington, KY

(As Modified: January 24, 1992)

Commonwealth Of Kentucky
Court Of Appeals

88-CA-002649-MR

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
CASE NO. 85-CI-0642

JOHN W. HUTCHINSON — *APPELLANT*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT,
MIKE SHARP, and DAN BULISHAK — *APPELLEES*

RENDERED: November 1, 1991; 10:00 a.m.

AFFIRMING IN PART AND REVERSING IN PART

BEFORE: DYCHE, HOWERTON, and STUMBO, Judges.

STUMBO, JUDGE. This is an appeal from a jury trial in the Fayette Circuit Court. Appellant's suit was grounded in both tort and civil rights violations and arose from an altercation with two police officers employed by the Lexington-Fayette Urban County Government (hereinafter "LFUCG"). LFUCG was granted summary judgment and dismissed as sovereignly immune.

Appellant argues three issues on appeal, to wit: 1) whether sovereign immunity bars liability for intentional as well as

negligent acts; 2) whether the court erred in failing to grant his motion for directed verdict against the individual officers; and 3) whether the trial court erred in refusing to instruct on appellant's 42 USC 1983 claim? We affirm on the first two issues and reverse on last.

The appellant, John W. Hutchinson, was a professor at the University of Kentucky. On March 7, 1984, he had taught a night class, had returned books to a collegaue, and had eaten dinner. While returning home at 10:00 p.m., he allegedly swerved in front of an unmarked police car. The police followed the appellant for about a mile without turning on the blue lights. As the appellant's van neared a driveway, the appellant turned off his lights and pulled into the driveway. At this point, the police turned on their blue lights.

The two officers, dressed in street clothes and carrying large flashlights, approached the appellant and identified themselves as the police. The appeallant stated that he lived there and requested identification. He was then shown police identification and badges; however, appellant claimed the identification was false because the signature on them was that of the police chief from two years earlier. Although denied by appellant, the police claimed he started to walk away. At this point, the police grabbed him and placed him under arrest. Appellant was later convicted of reckless driving. Throughout this time, the appellant refused to identify himself and was very belligerent.

Uniformed officers later appeared on the scene, as did the EMT's. The appellant continually refused to identify himself until a police lieutenant, who appellant personally knew, arrived. Appellant claims that, prior to the arrival of the other officers and the EMT's, he was beaten by the appellees. There was very little evidence presented at trial to support this, including testimony by witnesses and physicians.

During trial appellant offered no proof of any possible liability of LFUCG other than the fact that it was the employer of the officers involved in the arrest. Respondeat superior is not a basis upon which civil rights liability can be found. *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Further, as found by

this Court in *Hempel v. Lexington-Fayette Urban County Government*, Ky. App., 641 S.W.2d 51 (1982), LFUCG is, like a county government, a subdivision of the state entitled to the protections of sovereign immunity. KRS 67A.060; *Cullinan v. Jefferson County*, Ky., 418 S.W.2d 407 (1967); *Moores v. Fayette County*, Ky., 418 S.W.2d 412 (1967).

The directed verdict motion made by appellant was properly overruled. CR 50.01; *Nugent v. Nugent's Executor*, Ky., 135 S.W.2d 877 (1940).

The real question before us is the failure of the trial court to instruct on appellant's 42 USC 1983 claim. There is no argument that a § 1983 action may be brought in the state courts. *Main v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); *Scott v. Campbell County Board of Education*, Ky. App., 618 S.W.2nd 589 (1981). A § 1983 action has been determined to be supplementary to the state remedy; but, there is no requirement that the state remedy be requested or sought. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). We must, therefore, examine whether the state tort action and the federal claim are indeed separate and distinct.

The trial court gave the following instructions upon which the verdict was rendered:

QUESTION NO. 1(A)

Do you believe from the evidence that Officer Sharp used more or greater force or means that would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ NO_____

QUESTION NO. 1(B)

Do you believe from the evidence that Officer Bulishak used more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ NO_____

Appellant does not contest the sufficiency of these instructions as to his tort action. However, the trial court seemed to be under the impression that if the jury found for appellant on the above instruction, the court could then find for appellant on the civil rights claim and award damages.

Generally speaking, an action under § 1983, wherein police officers are accused of mistreating a plaintiff, may include in the instructions the following considerations: 1) conduct of the officers which "shocks the conscience," particularly where such conduct was malicious or sadistic; 2) the need for application of force; 3) the relationship between the need and the amount of force actually used; 4) the extent of injury inflicted; and 5) whether force was applied in a good faith effort to effectuate the arrest. *See, Davis v. Forrest,* 763 F.2nd 257 (8th Cir. 1985); *Greene v. City of New York,* 675 F.Supp. 110 (S.D. N.Y. 1987).

This particular action was framed as a deprivation of appellant's right to be free from the infliction of summary punishment without due process of law. The instructions given herein make absolutely no reference to appellant's § 1983 civil rights claims. As in *Wilson v. Jackson,* 505 A.2d 913 (1986), we must reverse the judgment as to the alleged § 1983 violation and remand for a new trial on that count because "[t]he instruction was deficient in its breadth in that it was confined to the common law and did not cover the law with respect to § 1983 civil rights violations." *Id.*, at 917.

HOWERTON, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS IN PART.

DYCHE, JUDGE, DISSENTING IN PART. I must respectfully dissent from so much of the majority opinion as remands for a new trial on the § 1983 action. That claim of appellant is based on "the use of excessive and completely unwarranted force" by Bulishak and Sharp; the tendered instruction also requried this finding to support an award under § 1983. The unanimous jury found against appellant on this issue, so it was no error, or at worst harmless error to add additional instructions more fully setting out the alleged cause of action.

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Lexington, KY

ATTORNEY FOR APPELLEE/
LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT:

Edward W. Gardner
Lexington, KY

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
NO. 85-CI-642

JOHN W. HUTCHINSON *PLAINTIFF*

verses

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, ET AL. *DEFENDANTS*

SUMMARY JUDGMENT

November 16, 1988

This matter having come on before the Court on the Motion of the defendant, Lexington-Fayette Urban County Government, for its summary judgment, and the Court having reviewed the memorandum submitted by the defendant, in addition to having heard arguments of counsel on October 25, 1988, and the Court being otherwise sufficiently advised, it is hereby

ORDERED AND ADJUDGED that there are no genuine issues as to any material fact and that the defendant, Lexington-Fayette Urban County Government, is entitled to a summary judgment and order of dismissal as a matter of law. Accordingly, the motion for summary judgment of the Lexington-Fayette Urban County Government is hereby sustained, and the plaintiff's Complaint against said defendant, Lexington-Fayette Urban County Government, is hereby dismissed, with prejudice.

/s/ James E. Keller

[s] JAMES E. KELLER
JUDGE, FAYETTE CIRCUIT COURT,
[True Copy]

FIRST DIVISION
ATTEST: ROBERT M. TRUE, CLERK
FAYETTE CIRCUIT COURT

By: J-L Deputy

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
85 CI 642

JOHN W. HUTCHINSON *PLAINTIFF*

versus

MIKE SHARP and DAN BUILSHAK *DEFENDANTS*

TRIAL, VERDICT AND JUDGMENT

November 9, 1988

Parties appeared this 25th day of October, 1988 and the jury empaneled herein met pursuant to adjournment.

The trial progressed and being concluded the numbers of the thirteen jurors were placed in the jury box and number "771" William McFadden was withdrawn and he was dismissed as the thirteenth juror from further consideration of this action.

The jury retired and returned into Court the following verdict, to-wit:-

QUESTON NO. 1(A)

Do you believe from the evidence that Officer Sharp used more or greater force or means that would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ **NO** XX

As the verdict was unanimous Edward B. Cupolo signed the verdict as foreperson.

QUESTION NO. 1(B)

Do you believe from the evidence that Officer Bulishak used more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

YES_____ NO XX

As the verdict was not unanimous Edward B. Cupolo signed the verdict as foreperson.

WHEREFORE IT IS ADJUDGED BY THE COURT THAT THE PLAINTIFF take nothing by his complaint and that the complaint is hereby dismissed and the defendants recover of the plaintiff their costs herein expended.

JAMES E. KELLER, JUDGE
FIRST DIVISION

ATTESTED COPIES MAILED TO:

HON. DAN TAYLOR
1052 Bardstown Rd.
Louisville, Ky. 40504
ATTORNEY FOR PLAINTIFF

HON. ERNEST JONES
259 W. Short St.
Lexington, Ky. 40507
ATTORNEY FOR DEFENDANT

THIS 9 DAY OF NOVEMBER, 1988.

ROBERT M. TRUE, C.F.C.C.

BY Carol Pendergrass D.C.

DISTRIBUTION:

Hon. Daniel T. Taylor, III
1052 Bardstown Road
Louisville, KY 40204

Hon. Edward W. Gardner
Lexington-Fayette Urban
County Government
Law Department
200 East Main Street
Lexington, KY 40507

Hon. Ernest H. Jones, II
259 West Short Street
Lexington, KY 40507

CLERK'S SIGNATURE

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
85CI-642

JOHN W. HUTCHINSON — *PLAINTIFF*

versus

MIKE SHARP and DAN BULISHAK — *DEFENDANTS*

INSTRUCTIONS

GENERAL INSTRUCTIONS

(a) Immediately upon retiring to the jury room, you shall elect one of your number as foreperson.

(b) Nine or more of your number must agree in order to answer any of the questions or make any of the determinations required by these instructions. The nine or more who agree on one however, need not be the same jurors who agree upon another.

(c) If all twelve of you agree on all the answers to the questions and the determinations to which you are required to respond, the foreperson alone can sign for you.

(d) Each answer or response on which the verdict is not unanimous must be signed by the nine or more of you who agree.

DEFINITIONS

"Medical expenses," means expenses incurred for hospital services or for any other institution engaged in providing medical, nursing or related services, medical services, medicines and medical supplies, nursing services, physical therepy, psychological and psychiatric evaluation and/or counselling, x-rays, emergency vehicles transportation and chiropratic services.

"Maliciously," means the intentional doing of a wrongful act with an evil or unlawful motive or purpose.

"Fair market value," means the price that property will bring when offered for sale by one who desires to sell, but is not compelled to do so, and brought by one who desires to purchase but is not compelled to have it.

INSTRUCTION NO. 1

It was the duty of the defendants, Officers Mike Sharp and Dan Bulishak, in arresting the plaintiff, Dr. John W. Hutchinson, not to use more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff.

QUESTION NO. 1(A)

Do you believe from the evidence that Officer Sharp used more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

(Check One) Yes_____ No X

FOREPERSON
(IF UNANIMOUS)

MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

QUESTON NO. 1(B)

Do you believe from the evidence that Officer Bulishak used

more or greater force or means than would have appeared to a reasonable person, in like circumstances, to be necessary in order to effect the arrest of the plaintiff?

(Check One) Yes_____ No_✓_

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

If you answered "no" to both questions nos. 1(A) and 1(B), you will proceed no further and return to the Courtroom.

INSTRUCTION NO. 2

If you answered "yes" to either questions nos. 1(A) or 1(B), or both, you will now determine from the evidence and award the plaintiff a sum or sums of money that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence he sustained directly by reason of the excessive force used in his arrest.

(a) For reasonable medical or dental expenses he has incurred:

$_____

(Not to exceed $1,402.00)

(b) For mental and physical suffering including any such suffering he is reasonably certain to endure in the future:

$_____

(Not to exceed $150,000.00)

(c) The difference between the fair market value of his computer immediately before the arrest and its fair market value immediately thereafter:

$_____

(Not to exceed $1,500.00)

_____

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

INSTRUCTION NO. 3

If you answered "yes" to question no. 1(A) and if you believe from the evidence that Officer Sharp acted willfully or maliciously in the use of excessive force while effecting the arrest of the plaintiff, you may, in your discretion, award the plaintiff punitive damages to be assessed against Officer Sharp.

We do / do not (circle one) award the plaintiff punitive damages to be assessed against Officer Sharp in the sum of

$_____
(Not to exceed $10,000.00)

_____

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

INSTRUCTION NO. 4

If you answered "yes" to question no. 1(B) and if you believe from the evidence that Officer Bulishak acted willfully or maliciously in the use of excessive force while effecting the arrest of the plaintiff, you may, in your discretion, award the plaintiff punitive damages to be assessed against Officer Bulishak.

We do / do not (circle one) award the plaintiff punitive damages to be assessed against Officer Bulishak in the sum of

$_____

(Not to exceed $10,000.00)

_____

FOREPERSON
(IF UNANIMOUS)

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MEMBERS OF THE JURY
(IF NOT UNANIMOUS)

Appellant's apprehension continued to mount, as to whether his Civil Rights claims would even be considered by this jury, in view of the following position expresed by the Trial Court on the first day of trial on two separate occasions:

> By the Court:
> "The only difference I can see between a 1983 action and this action would be attorneys' fees."
> (TAPE: 22/1/33/VCR/080 A-1; OCT 24 88; 13:57:58)

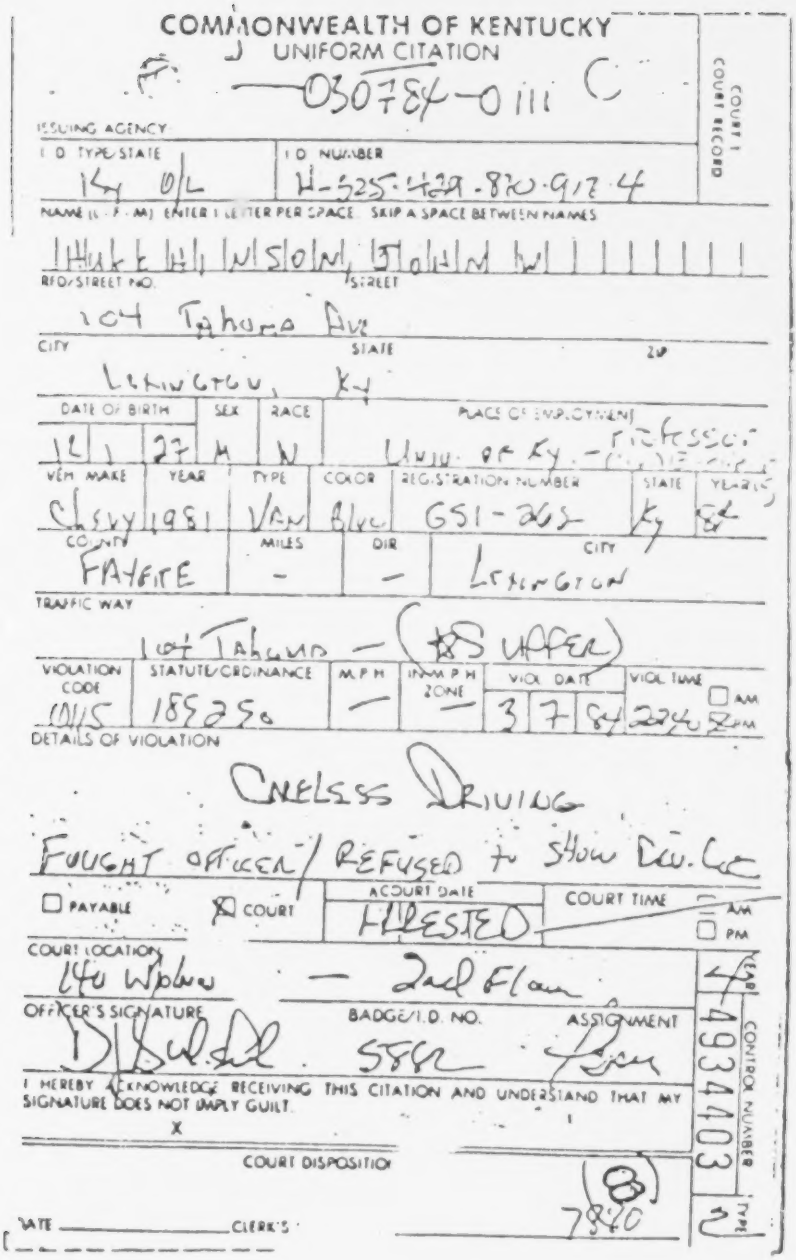
> By the Court:
> "The bottom line is the only difference between the tort remedy as provided in the State Statutes, or State common law, and the Civil Rights Act, is attorneys' fees."
> (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; 16:44:33).

As the case continued Appellant's Counsel continued to urge the Constitutional issue sued upon. (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; 16:42:07) (App. A-11).

However, even from the first day of trial it was evident that the Trial Court was not disposed to give sufficient instructions in this case, under the separate theories advanced. (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; 16:46:15((App. A-12).

Nonetheless, throughout this trial, Appellant had diligently pressed his Constitutional claims. (TAPE: 22/1/88/VCR/080 A-2; OCT 25 88; 16:39:59)/(App. A-13) (TAPE: 22/1/88/VCR/080 A-1; OCT 24 88; (App.A-14) 16:45:32).

Though apparently in Appellant's favor, the next rulings by the Trial Court compounded this problem because in what was internally inconsistent and totally contradictory, it *overruled* the Defendants' Motion for directed verdict as to the §1983 Constitutionality claims, (TAPE: 22/1/88/VCR/080 A-2; 16:23:58) (App. A-15), and then turned right around and directly refused to accord Appellant any instructions whatsoever on his claimed Civil Rights violations under 42 U.S.C. 1983, particularly the due process provision in the Fourteenth Amendment.



COMMONWEALTH OF KENTUCKY
UNIFORM CITATION

030784-0111 C

COURT 1 COURT RECORD

ISSUING AGENCY

I.D. TYPE/STATE: Ky O/L
I.D. NUMBER: H-525-429-870-917-4

NAME (L - F - MI) ENTER 1 LETTER PER SPACE SKIP A SPACE BETWEEN NAMES

HUKE WILSON, JOHN W

RFD/STREET NO. 104 STREET Tahoma Ave

CITY LEXINGTON STATE Ky ZIP

DATE OF BIRTH 12/1/27 SEX M RACE W PLACE OF EMPLOYMENT Retired - Univ. of Ky.

VEH MAKE Chevy YEAR 1981 TYPE VAN COLOR Blue REGISTRATION NUMBER GS1-263 STATE Ky YEARS 84

COUNTY FAYETTE MILES - DIR - CITY LEXINGTON

TRAFFIC WAY 104 Tahoma - (85 Upper)

VIOLATION CODE 1015 STATUTE/ORDINANCE 189.290 M.P.H. - IN M.P.H. ZONE - VIOL. DATE 3/7/84 VIOL. TIME 2245 ☐ AM ☒ PM

DETAILS OF VIOLATION

Careless Driving
Fought officer / Refused to show Dr. Lic

☐ PAYABLE ☒ COURT ACCURT DATE ARRESTED COURT TIME ☐ AM ☐ PM

COURT LOCATION 140 W Main - 2nd Floor

OFFICER'S SIGNATURE D Sudduth BADGE/I.D. NO. 5882 ASSIGNMENT Traffic

I HEREBY ACKNOWLEDGE RECEIVING THIS CITATION AND UNDERSTAND THAT MY SIGNATURE DOES NOT IMPLY GUILT.
X

COURT DISPOSITION

DATE _____ CLERK'S _____

YEAR 84 CONTROL NUMBER 4934403 TYPE 2

(8) 7840

No. 8

BEST AVAILABLE COPY

In regard to these Instructions refused by the Court, the question may be asked, "what difference did it make?"

First, and particularly when, as was done here, each juror was given a set of the written Instructions, the absence of a Constitutional rights instruction lessened the Appellant's probability of prevailing on the other prong of his lawsuit.

Next, without this instruction, Appellant's rights under the Fourteenth Amendment, as was his parimary claim were reduced to an absolute nothingness. Additionally the same occurred as to the Fourth Sixth Amendment aspects of the case, and other elements in it. Is it not a basic right to be informed of the charge against one? *Did not the incorrect statement on the arrest slip ("fought officers") qualify as summary punishment, as its purpose was to damage Hutchinson further, and justify the setting of a high bond on him? [Emphasis added].*

But finally, and most importantly, a deeper consideration is involved here, and it is whether or not at this point in time the American people - awash in near-hysteria over crime, and inundated daily by television's bizarre and lopsided misrepresentations of legitimate police power - actually know whether there both should be and are limitations on same. After all, doors are kicked in, heads cracked, and Clint Eastwood intones "Make my day".

It must be urged that simplistic attitudes like this can make for a simple-minded electorate, the result being a society that becomes simply intolerable. Here was a case involving priceless "dignitary interests" that cried out for Instructions from the Court that one has the Constitutional right to be secure from summary punishment, but they were not given.

INSTRUCTON NO.

Even a person under arrest has certain liberties that cannot be taken from him, including the liberty to be free from unlawful attacks in his physical being. This Plaintiff, John Hutchinson, both before, during and after any arrests had the right under the Federal Consitituion not to be deprived of this remaining liberty without due process of law, and if it was done by these Defendants, you should award.

INSTRUCTION NO.

You as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You should carefully scrutinize all the testimony given, the circumstances under which each witness testified, and every manner and evidence which tends to show whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the stand. Consider the witness' ability to absorb the matters as to which he testified and whether he impressed you as having an accurate recollection of these matters. Consider also any relationship each witness may bear to either side of the case, the manner in which each witness may be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. Inconsistencies or discrepancies in the testimony of witness, or between the testimony of different witness, may or may not cause the jury to discredit that testimony. Two or more persons witnessing an incident or transaction may see or hear it differently, as the inconsistent misrecollection, like a failure of recollection, is not an uncommon experience. In weighing the effect of discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent/or from falsehood. After making your judgement you will give the testimony of each witness such credibility, if any, you may think it deserves.

INSTRUCTION NO.

The law provides that an individual has the right to remain silent when in the focus of an investigation and confronted by a police officer; it is not against the law to do so, indeed it is a basic right provided to all by the Consititution of the United States.

INSTRUCTION NO.

The burden in this case is upon the Plaintiff, Hutchinson, to prove its claim by a preponderance of the evidence in this case. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. In civil actions such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if after a consideration of all the evidence in the case, the jurors believe that what is sought to be proven on that issue is more likely true than not.

INSTRUCTION NO.

When two or more persons participate or cause in any way an assault upon the Plaintiff, John Hutchinson or other deprivations of his Constitutional rights, such as failure to keep him safe, or failure to provide necessary medical care, they incur a joint and several liability for the acts of each and all of the joint participants, and you must find for the Plaintiff against all of them who so acted. The law does not require the injured party to establish how much of the injury was done by one person and how much of the injury was done by another. Rather, it permits the injured party to treat all concerned in the injury jointly, and all are liable to the Plaintiff. All those who actively participate in a wrongful act, by cooperation or request, or who lend aid to encouragement to the wrongdoer, or who ratify or adopt the acts of a wrongdoer, or who knowingly fail to perform a duty to prevent a wrongful act, are equally liable to the victim of the wrongful act. Express agreement is not necessary, and all that is required is that there should be a common design or understanding, even though it be a tacit one.

If you find that one or more of the Defendants participated in or knowingly failed to act in accord with a duty to prevent a wrongful act by another, you must fine that Defendant or those Defendants liable, even if one or more of the wrongdoers is not a party to this lawsuit.

INSTRUCTION NO.

The Plaintiff, John Hutchinson, as does any person within the United States, has the right, guaranteed by the Constitution, to be free and safe from the infliction of summary punishment. This right of the Plaintiff, or anyone arrested, is not diminished or suspended in any way whatsoever, even due to belligerence, or noisiness, or so-called "non-cooperation" claimed by the police in the part of the person arrested, and you may not use same to justify the actions of the Defendants herein. The abridgment of this right is compensable in money damages, and if you find that this right of the Plaintiff was abridged in this case, you shall so find in damages for Plaintiff.

INSTRUCTION NO.

The testimony of a police officer is entitled to no special or exclusive sanctity. A police officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does, and in the case police officers you should not believe them merely because they are police officers. You should recall their demeanor on the stand, their manner of testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed by the government, including policemen, do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

INSTRUCTION NO.

Section 1983 of Title 42 of the United States Code provides that any inhabitant of this Federal District may seek redress in this Court by way of damages against any person or persons who under color of law, statute, ordinance or regulation or custom, knowingly subjects such inhabitant to the deprivation of any right, privilege or immunity secured or protected by the Constitution or laws of the United States. The statute just outlined to you comprises one of the Civil Rights Acts enacted

by Congress under the 14th Amendment of the Constitution of the United Sates. The 14th Amendment to the Constitution of the United States provides that no State shall deprive any person of life, liberty or property without due process of law.

INSTRUCTION NO.

The fact that Plaintiffs' rights are found to have been violated in itself entitles him to actual damages which the law calls compensatory damages.

Therefore, if you decide for the Plaintiff, John Hutchinson, on the issue of liability, you must then fix the amount of money damages which will reasonably and fairly compensate him for any harm which the wrongful conduct of the Defendants was a substantial factor in bringing about. Among the elements of injury and harm which you say consider are:

1. The violation of his Constitutional right to liberty and to due process of law;

2. The reasonable expense of legal services required and received by the Plaintiff to defend and clear himself, if he was charged with a criminal offense;

3. The physical harm to the Plaintiff during and after the imprisonment, including ill health and physical pain or discomfort;

4. The emotional and mental harm to the Plaintiff during and after imprisonment, including fear, humiliation, and mental anguish;

5. The reasonable expense of medical or psychological care, treatment, and services required and received by the Plaintiff in connection with his physical and psychological injuries;

6. The extent and duration of the injuries, including their continuation in the future.

Whether each of these elements of damages has been proven by a preponderance of the evidence is for you to determine.

INSTRUCTION NO.

You may also award Plaintiff, John Hutchinson, punitive damages against the Defendants.

The function of punitive damages is to punish the defendant for malicious conduct and to deter similar conduct by others. Whether you decide to award any punitive damages should be based on whether you find that the Defendants have engaged in one of the following three things: (1) willfull or malicious violations of the Plaintiff's Constitutional rights; (2) intentional acts by the Defendants in gross disregard of the Plaintiff's Constitutional rights; (3) reckless disregard by the Defendants, whether or not they were violating the Plaintiff's rights.

If you find that they have done one of those things, then you should award punitive damages.

INSTRUCTION NO.

If you find that the Plaintiff, John Hutchinson, has been deprived of his Constitutional rights, you shall award damages to compensate him for the deprivation.

Damages for this type of injury are more difficult to measure than damages for a physical injury or injury to one's property.

Merely adding up medical bills or other expenses is not an adequate measure of how much compensation is appropriate.

In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does not mean that an appropriate monetary amount should not be awarded.

The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your discretion. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, the significance which this particular issue had for the Plaintiff, and the significance of the right in the context of the activities which Plaintiff was engaged in at the time of the violation of the right.

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
NO. 85-CI-642

JOHN W. HUTCHINSON *PLAINTIFF*

verses

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, et al. *DEFENDANTS*

SUPPLEMENTAL INSTRUCTIONS
TENDERED BY PLAINTIFF

Pursuant to Order of Court, Plaintiff tenders the attached Instruction, and respectfully reserves the right to supplement or amend same.

Served October 17, 1988, by personal service upon opposing Counsel; Hon. Edward W. Gardner, Department of Law, Lexington-Fayette Urban County Government Bldg., 200 W. Main St., Lexington, KY 40507; and Hon. Ernest H. Jones, II, Geralds, Moloney & Jones, 259 West Short Street, Lexington, KY 40507.

Daniel T. Taylor III
COUNSEL FOR PLAINTIFF
1052 Bardstown Road
Louisville, KY 40204
(502) 587-6097

INSTRUCTION NO.

The fact that the Defendants Bulishak and Sharp, or either of them, either through ignorance or indifference, may have had no specific intent or purpose to deprive this Plaintiff of his Civil Rights will not absolve that Defendant from liability if he did in fact deprive Plaintiff of his rights.

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION
NO. 85-CI-642

JOHN W. HUTCHINSON — *PLAINTIFF*

versus

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT, et al. — *DEFENDANTS*

FURTHER INSTRUCTION
TENDERED BY PLAINTIFF

If you find from the evidence in this case that the two Defendants applied excessive force in their arrest of the Plaintiff, then you shall find, and I instruct you as a matter of law, that this is a deprivation of due process of law as guaranteed to the Plaintiff by the Fourteenth Amendment, and you must award damages to Plaintiff in a reasonable and substantial amount to compensate him for same.

Respectfully tendered this October 25, 1988.

Daniel T. Taylor III
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